MEMORANDUM OF LAW

DATE: September 24, 1991
NAME: Paul Gagliardo, Deputy Director, Waste Management

FROM: Deborah L. Berger, Deputy City Attorney

SUBJECT: CEQA Compliance For Execution of Contract With Daneco For Proposed Materials Recovery Facility ("MRF")

ISSUE PRESENTED

Whether a contract between Daneco and The City of San Diego ("City") to build the MRF, which is not site specific and is conditioned upon future CEQA compliance, can be executed without environmental review.

CONCLUSION

Entering into such a contract is an activity which is subject to CEQA compliance because it is a discretionary act of a public agency that will unquestionably have an ultimate impact on the environment. Even though no tangible physical activity is involved and the environmental effects may be difficult to assess at this stage, at a minimum, an environmental review of the potential impacts of the MRF, wherever located, would be required. In light of the current Environmental Impact Statement ("EIS") being prepared under the Master Plan for the Miramar Landfill Acquisition which includes the MRF, a strong argument exists that the project description for the purposes of environmental review should include a specific site analysis of this location and alternate sites prior to entering into the agreement. Any analysis of the MRF contained in the EIS could, and should, be incorporated in an EIR certified at the time of the execution of a contract for the MRF.

ANALYSIS

A. Is the execution of a contract which is not site-specific an activity which is subject to CEQA review?

The law is very clear that in fact the execution of such a contract would require CEQA review. CEQA requires that all local agencies certify completion of an EIR "on any project they intend to carry out or approve which may have a significant effect on the environment." Public Resources Code section 21151 (emphasis added). In answering the question posed three subissues arise:

(1) What is the "project";
(2) What constitutes the "approval"; and
(3) Is there a potentially significant effect on the environment; if so, what is the scope of review required?

Pursuant to the definition of "project" contained in Public Resources

section 21065, in particular subsections (b) and (c), the execution of a contract with Daneco is an activity which constitutes a "project" requiring CEQA compliance.F

Public Resources section 21065. "Project" defined

"Project" means the following:

(a) Activities directly undertaken by any public agency.

(b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

Furthermore, as discussed below, the project description required by law should include the MRF, and more likely the MRF at the Miramar site, either of which would unquestionably have an ultimate impact on the environment. Secondly, the execution of the contract would constitute the requisite "approval" by the public agency which would require prior CEQA compliance. CEQA requires that the environmental consequences of any proposed activity, whether public or private, be considered at the earliest possible opportunity. Guidelines section 15004F

Guidelines are contained in California Administrative Code Title 14, Chapter 3.

; Christward Ministry v. Superior Court, 184 Cal.App.3d 180, 194 (1986) and Natural Resources Defense Council Inc. v. Arcata National Corporation, 59 Cal.App.3d 959, 969 (1976). The argument that the mere execution of a contract for a site to be named after completion of the CEQA review process is only a preliminary activity not requiring CEQA review, has been rejected by the courts in many situations analogous to this case. (See discussion below.) Finally, the scope and degree of specificity required for the CEQA review are limited by the level of details available at the time of the project approval, to wit: contract execution. See Guidelines section 15146.

B. What is the "project" for purposes of environmental analysis?

The term "project" is understood to have a "sweeping definition" requiring broad interpretation in order to maximize protection of the environment. Bozung v. Local Agency Formation Commission, 13 Cal.3d 263, 278-281 (1985); McQueen v. Board of Directors, 202 Cal.App.3d 1136, 1143 (1988). An accurate project description is not only necessary for an intelligent evaluation of the potential environmental effects of a proposed activity, but is deemed crucial to proper implementation of CEQA. An inappropriately narrow description of a project which either results in overlooking cumulative impacts by focusing on isolated parts of the whole action or avoids CEQA compliance altogether is severely

criticized by the court. Id.

Guidelines section 15378 defines "project" as "the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately," and in subsection (c), specifically rejects the contention that the project is any of the separate government approvals which may be required to implement the ultimate activity. Subsection (d) goes on to mandate that when a choice exists between describing the project as the developmental proposal or the adoption of a particular regulation, it must be defined as the ultimate developmental proposal for the purposes of environmental analysis. Hence, the "project" which is subject to environmental review at the time of execution of this contract with Daneco, is the ultimate developmental proposal, to wit: the construction of the MRF.

Moreover, in developing an accurate description of the "whole project," the agency must not only focus on the ultimate or "larger project" as opposed to the first phase of the project,F
Section 15165. Multiple and Phased Projects.

Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project as described in Section 15168. Where an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project. Where one project is one of several projects of a public agency, but is not deemed a part of a larger undertaking or a larger project, the agency may prepare one EIR for all projects, or one for each project, but shall in either case comment upon the cumulative effect.
the definition of
the larger project must include all reasonably foreseeable aspects of that project. See Public Resources Code section 21083(b) ("probable future projects" analysis required for cumulative effects), Guidelines section 15144 (obligation to forecast what "reasonably can"); Citizens Association For Sensible Development of Bishop Area v. County of Inyo, 172 Cal.App.3d 151, 168 (1985).

The courts have consistently held that any environmental analysis of a first phase agency approval, such as approval of a general plan amendment, must necessarily include consideration of the "larger project" which is deemed to include the future development permitted as a result of the initial or first phase approval. The courts have repeatedly cautioned against "chopping up" the project into a "piecemeal environmental review" which circumvents the purpose of CEQA. Citizens Association For Sensible Development of Bishop Area v. County of Inyo, supra, at 165; Christward Ministry v. Superior Court, supra, at 196;

McQueen v. Board of Directors, supra, at 1144; and City of Carmel By The Sea v. Board of Supervisors, supra, at 241-247.

Hence, the project must be defined to encompass the totality of what is reasonably foreseeable as the ultimate project. A public agency is simply not permitted to subdivide a single project into smaller individual subprojects in order to avoid the responsibility of considering the environmental impact of the project as a whole.F Orinda Association v. Board of Supervisors, 182 Cal.App.3rd 1145, 1171 (1986) - the court held that the demolition permit could not be considered a separate project from the overall redevelopment plan of which demolition of the one building was just a part. Prior to the issuance of the demolition permit the entirety of the project, the entire redevelopment plan, should have been subjected to CEQA review.

Therefore, to define the project for purposes of CEQA as simply the execution of a contract for a MRF with the site to be designated, would constitute a failure to consider the entirety of the project as it is reasonably foreseeable to be at this point in time.

In Citizens Association For Sensible Development of Bishop Area v. County of Inyo, supra, at 168, the court specifically held that "even projects anticipated beyond the near future should be analyzed for their cumulative effect" and that "related projects currently under environmental review unequivocally qualify as probable future projects to be considered in a cumulative analysis." (Emphasis added.) Therefore, the related project of the MRF on the Miramar Landfill which is currently under environmental review, would have to be considered in a cumulative analysis, even if not incorporated in the definition of "the larger project."

C. Does execution of the contract constitute the "approval" which requires prior CEQA compliance?

"Approval means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. ...Legislative action in regard to a project often constitutes approval." Guidelines section 15352(a)F 15352(b) "with private projects, approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use at the project." Private project is further defined in Guideline section 15377 as "a project which will be carried out by a person other than a governmental agency, but the project will need a discretionary approval for one or more governmental agencies for: (a) a contract or financial assistance; or (b) a lease, permit, license, certificate, or other entitlement for use." Predicated on the foregoing, even though the MRF is

likely to be under public ownership, it is still arguably a "private project" since it will be both constructed and operated by a private entity. This would bring it under the ambits of Section 15352(b) unequivocally rendering the execution of the contract the "earliest commitment" requiring CEQA review. . It is clear that the environmental review must occur before granting any approval. However, what constitutes "approval" is a difficult, but critical, question of timing. It is acknowledged in Guidelines section 15004, that this issue of timing involves the balancing of many competing factors requiring environmental review "as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment," also described as the "earliest feasible time." For both private and public projects, the courts have held that environmental consequences must be considered at the earliest possible stage. Christward Ministry v. Superior Court, supra, at 194. Even though the "approval" triggering CEQA compliance is considered the first action taken, the "project" is the underlying, or ultimate, activity.

The courts have specifically rejected the notion that environmental review is not required with a preliminary governmental approval that results in no tangible physical activity and has environmental consequences which are difficult, if not impossible, to ascertain. Bozung v. Local Agency Formation Commission, supra; City of Carmel By The Sea v. Board of Supervisors, supra; Terminal Plaza Corporation v. City and County of San Francisco, 177 Cal.App.3d 892, 904-905 (1986); and City of Livermore v. Local Agency Formation Commission, 184 Cal.App.3d 531, 538 (1986).

In City of Carmel By The Sea v. Board of Supervisors, supra, the court rejected the city's argument that rezoning did not require environmental review because it was merely a preliminary governmental approval with no significant environmental effect. The court made it quite clear that even though this initial "paper-shuffling" was not the "project" subject to environmental analysis, it did constitute the "approval" necessitating prior CEQA compliance. The court once again reiterated that whatever is the "necessary first step in the chain of events which will culminate in a physical impact on the environment" requires full CEQA compliance "even though additional EIRs might be required for later phases of the project." The court went on to explain:

> Moreover, we find the contention that rezoning was an isolated incident with no significance of its own to be somewhat disingenuous in light of the fact that during the course of the hearings it became evident that development was

> planned on the Mission Ranch property, for which the rezoning was the first step. . . .Thus it appears from the record that the rezoning application was not merely an effort to comply with state law in the abstract, but was a necessary first step to approval of a specific development project.

Id. at 243, 244.

In City of Livermore v. Local Agency Formation Commission, supra, at 538, the court was not persuaded that because the precise effects of a change in the LAFCO guideline revisions were difficult to assess at that stage, CEQA review was not required. The court reasoned that even though there was no tangible physical activity and the effect of the guideline revision on the environment was remote, such "policymaking" did have a foreseeable ultimate impact on the environment that required CEQA review.

The mere enactment of an ordinance requiring relocation assistance to hotel residents when a permit for conversion of residential hotels was granted was deemed a project requiring environmental review in Terminal Plaza Corp. v. City and County of San Francisco, supra. Even though the court acknowledged that remote contingencies and sheer speculation as to future consequences need not be evaluated under CEQA, the court refused to accept the argument of the city that the impact of possible replacement construction as a result of the ordinance was too amorphous and conjectural to permit accurate assessment.

> We of course recognize that it is presently impossible to determine with specificity the number, nature or location of replacement construction projects. Until such projects are proposed, their impact-individually and in the aggregate-cannot be gauged with exactitude. But that the ordinance reasonably portends possible future environmental impacts flowing from the cumulative effect of probable replacement construction projects seems undeniable. And even before specific projects are commenced the city may be able to state-at least in general terms-that the ordinance will have an impact upon the environment, or to dismiss that possibility. Without a threshold evaluation, however, the city leaves its constituents in ignorance of the avoidable dangers CEQA intended to avert. If a "project" poses the possibility of significantly influencing the environment, as the subject ordinance clearly seems to do, the inability of

> the city to identify impacts ought not to relieve it of the responsibility to prepare an appropriate EIR in accordance with Section 21151.

Id. at 904, 905. ┌Emphasis added.σ

The argument made in Bozung v. Local Agency Formation Commission, supra, at 278 that the annexation approval was merely permissive and did not compel the city to complete the annexation was also dismissed by the court. The court explained that, as with building permits which authorize but do not require developers to proceed, the fact that there was no obligation to proceed did not negate the fact that the issuance of such a permit required environmental review.

Based on the foregoing, it seems clear that the execution of a contract with Daneco to construct the MRF at some site to be ascertained later after CEQA review compliance is an "approval" which requires environmental review. The fact that it is preliminary, with arguably remote and difficult to ascertain environmental impacts, does not preclude it from being deemed the "earliest possible opportunity" for environmental review. This leads to the final issue of the scope and nature of the environmental review which is required.

D. What are the environmental impacts or scope of review required?

An environmental reviewF

In New Oil Inc. v. City of Los Angeles, 13 Cal.3d 68, 73-74 (1975), the California Supreme Court gave effect to a guideline section defining a three-tiered process for determining how to proceed under CEQA. The three steps in the process are set forth in the guidelines sections 15002(k), 15061, 15063-15065, 15070, 15071. If an agency has determined that a proposal does, in fact, constitute a "project" the first step requires a determination as to whether the project is exempt. If the project is not exempt, the second step requires the agency to conduct an "initial study." If the initial study produces no substantial evidence, or reasonable inferences therefrom, of significant environmental impacts, the agency may issue a "negative declaration." If not, a full environmental review in the form of an environmental impact report (EIR) must be prepared.

is required at the "earliest possible opportunity" of the "whole of the action" of all "direct or ultimate" effects on the environment which "may" result. (Public Resources sections 21100, 21151) In the present case, the "earliest possible opportunity" is the execution of the contract with Daneco to build the MRF and the "whole of the action" which will be deemed the "project" for purposes of environmental review would encompass all that is reasonably foreseeable at the time of execution of the contract, most likely the MRF

at the Miramar Landfill and alternate sites. The degree of specificity and scope of environmental review will be directly related to the level of "project" details known at the time of execution of the contract.

> Section 15146. Degree of Specificity.
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> The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR.
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> (a) An EIR on a construction project will necessarily be more detailed in the specific effects of the project than will be an EIR on the adoption of a local general plan or comprehensive zoning ordinance because the effects of the construction can be predicted with greater accuracy.
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> (b) An EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption, or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow.

Hence, at the time of execution of the contract, the environmental review is defined by the details known about the project at that point in time. Subsequent construction, design, architectural or more detailed contracts, permits or approvals may require supplemental review to the original EIR. In addition, a "Staged EIRF
A Master Environmental Assessment is another vehicle which can be considered for CEQA compliance for this project. See Guidelines section 15169.
" can be utilized with large capital projects requiring a number of discretionary approvals over a period in excess of two years before construction begins. Guidelines section 15167.

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